

The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation

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I. INTRODUCTION

On June 13, 1987, the famous case of *Miranda v. Arizona*¹ celebrated its twenty-first birthday. Although the police have become reconciled to it, at least to the extent that attacks on it seldom appear in the police literature,² it has been under siege from two other directions. First, in a series of cases, some of them quite recent, the Supreme Court itself has questioned the doctrinal underpinnings of *Miranda*.³ Second, the attorney general has recently urged that *Miranda* be overruled.⁴ In this article, I shall begin by briefly describing the holding and rationale of *Miranda*. Then I shall canvass, also briefly, the reaction of the police, the Supreme Court and the present attorney general. Finally, I shall play a game of "what if?" What if *Miranda* were overruled—what test would courts use for determining the admissibility of confessions? As you will see, courts would probably use the test that they used in the good old days before *Miranda*—the "involuntary confession rule." How well that rule worked in the past (and is likely to work in the future) and whether, in 1966, there was a need for a change in the constitutional law governing interrogation and confessions are the questions to which the bulk of this article will be addressed.

II. THE HOLDING AND RATIONALE OF *MIRANDA*

The holding of *Miranda* is simply stated. The rationale is much more complex.

The holding of *Miranda* is that if the police want to interrogate a suspect who is in custody, they must first give him the now-familiar, four-fold warning of rights and then obtain a legally valid waiver of those rights.⁵ They must advise him that he

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1. 384 U.S. 436 (1966).

2. See *infra*, notes 26–31, and accompanying text.

3. See *infra*, notes 32–56, and accompanying text.

4. See *infra*, notes 57–63, and accompanying text.

5. 384 U.S. 436, 444, 467–79 (1966). Preceding this holding was another—that the fifth amendment's prohibition of compulsory self-incrimination is applicable to police custodial interrogation. *Id.* at 461. In 1966, this holding was both novel and controversial. *Id.* at 506 n.2, 510–11 (Harlan, J., dissenting) (historically, privilege against compulsory self-incrimination applicable only to proceedings in which interrogator had the power of contempt to compel answers). Today, this holding seems to be accepted even by those who disparage *Miranda*'s advice/waiver approach. See Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 926–27 (1979). Contemporary acceptance is due in no small part to Professor Yale Kamisar's trenchant articles, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966), and *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *CRIMINAL JUSTICE IN OUR TIME I* (A. Howard ed. 1965), reprinted in Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 27 (1980). See also A. BEISEL, *CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT* 101–03 (1955).

has the right to remain silent; that anything he says can be used against him; that he has the right to be represented by counsel; and that counsel will be provided for him if he is unable to afford counsel.⁶ Once a properly advised suspect has waived, the police may interrogate.⁷ If the police do not engage in interrogation, *Miranda* requires nothing even though the suspect is in custody.⁸ Conversely, if the suspect is not in custody, *Miranda* is inapplicable even though the police engage in interrogation.⁹ *Miranda* applies only when the suspect is both in custody and about to undergo interrogation.

The rationale of *Miranda* cannot be stated so simply. *Miranda* was in fact not just a single case but four cases involving unrelated crimes, all decided under the same title.¹⁰ Early in its opinion, the Court observed that common threads ran through the cases. Each suspect had been taken into custody and was therefore not willingly associating with the police; each suspect had been taken to the police station, an environment dominated by the police; each suspect had been placed in an interrogation room and subjected to secret interrogation, that is, interrogation not open to public view; and each suspect had confessed.¹¹

Having identified the common threads, the Court asked what custodial police interrogation is like and what effect it is likely to have on a suspect.¹² The questions were frustrating, for the very secrecy of interrogation makes it impossible for all of us, including judges, to know what goes on in the interrogation room, much less to know how a particular suspect was affected.¹³ Not having first-hand knowledge, the Court did the next best thing: it went to the library. There it found a plethora of materials spanning three and a half decades. The materials included the 1931 report of a Presidential Commission detailing the pervasiveness of the third degree in American police tactics.¹⁴ Also included were cases that the Court itself had decided in the 1930s, '40s and '50s in which it was uncontroverted that extreme physical or psychological pressure had been applied to the suspect.¹⁵ Finally, and perhaps most damning of all, the Court took note of police manuals of the '40s, '50s and '60s. These books advised officers to overcome a suspect's reluctance by using tactics such as (1) telling the suspect that lawyers are expensive and silence is an admission of guilt; (2) acting always as though the suspect is guilty; and (3) giving the suspect an inducement to confess by minimizing the moral seriousness of the crime, blaming the victim or a third person, or suggesting other excuses.¹⁶

6. 384 U.S. 436, 444, 467-79 (1966).

7. *Id.* at 444, 475-76.

8. *Rhode Island v. Innis*, 446 U.S. 291 (1980).

9. *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Oregon v. Mathiason*, 429 U.S. 492 (1977).

10. The other cases were *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*, 384 U.S. 436 (1966) (Syllabus).

11. 384 U.S. 436, 445 (1966).

12. *Id.*

13. *Id.*

14. *Id.* at 445-46, referring to IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

15. 384 U.S. 436, 446 n.6 (1966) (citing, for example, *Leyra v. Denno*, 347 U.S. 556 (1954); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Brown v. Mississippi*, 297 U.S. 278 (1936)).

16. 384 U.S. 436, 448-56 (1966). The Court relied principally on F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); and C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956).

Having perused the literature, the Court concluded:

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. . . . The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.¹⁷

This passage is the crux of *Miranda*'s rationale. Notice that it does not say that the police in any of the four cases actually used tactics that were specially offensive—such as force, threats or prolonged interrogation. Rather, it says that compulsion *inheres* in custodial interrogation to such an extent that *any* confession, in *any* case of custodial interrogation, is compelled and therefore obtained in violation of the fifth amendment's stricture against compulsory self-incrimination.¹⁸

Having identified the problem, the Court had to solve it. The most obvious solution was also the boldest and most costly: if custodial interrogation inherently violates the fifth amendment, then custodial interrogation should be prohibited.¹⁹ This solution, however, would have deprived society of a valuable law enforcement

17. 384 U.S. 436, 457–58 (1966).

18. Although the reference to inherent compulsion also appears elsewhere in the opinion, 384 U.S. 436, 467, 468, 478 (1966), other passages seem to suggest a different rationale. According to Professor Archibald Cox, the former Solicitor-General,

The opinion, fairly read, does not assert that police interrogation in the station house or district attorney's office is always coercive unless the stated rules or their equivalent are satisfied. Some of the language points in that direction, especially a reference to "the compulsion inherent in custodial surroundings," but the thrust of the argument seems to be that unless prophylactic measures are employed there will be inadequate assurance that any confession obtained in secret is not procured by compulsion violating the privilege against self-incrimination. The emphasis was on the need for prophylactic rules rather than the compulsion present in every case. Such phrases as "procedural safeguards," "protective device," and "adequate protective device" are scattered throughout the opinion.

Cox, *The Role of Congress in Constitutional Determination*, 40 U. CIN. L. REV. 199, 250–51 (1971).

Although it is doubtful that Professor Cox intended to question the constitutional legitimacy of *Miranda*, *id.* at 247–52, his "prophylactic rule" interpretation has given rise to a veritable cottage industry devoted to assessing whether the Court had the constitutional authority to prescribe the *Miranda* warnings. Compare Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985) and Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 106–11 (1985) with Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat* 26 WASHBURN L.J. 1 (1986) and Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987) and White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986). Professor Schulhofer's recent work touches on many of the issues that I have raised in the present article. I regard it as "must" reading for anyone who wants to be well informed about *Miranda*.

The legitimacy of *Miranda* is far beyond the scope of this Article, but I cannot resist the temptation to put a small part of my thumb into the pie. Professor Grano says that a rule is prophylactic if violating it "may result in the reversal of a federal or state criminal conviction even though the conviction itself was not obtained in violation of the Constitution." Grano, *supra*, at 101. He goes on to say that whether a rule is prophylactic depends on what the Court says is the rationale for its decision. *Id.* at 105–6. I take Professor Grano to mean that whether a rule is prophylactic depends on the intent of the drafters, *i.e.*, on the intent of the judges who comprised the majority—or on "judicial intent," if you will. A judicial opinion, however, is merely a document, as is a statute, and "judicial intent" can therefore be analogized to "legislative intent." Consequently, the varied techniques that we commonly use in interpreting statutes should be used when the meaning of a judicial opinion is questioned unless a particular approach is inherently limited to the statutory context. However, none of the articles cited above applies these techniques except to parse the unclear text of Chief Justice Warren's opinion. Thus, the analysis in all of these articles is incomplete.

19. See Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 880–81, 883–84 (1981); Grano, Book Review, 84 MICH. L. REV. 662, 667, 672 (1986) (reviewing F. INBAU, J. REID & J. BUCKLEY, *CRIMINAL INTERROGATION AND CONFESSIONS* (3d ed. 1986)).

tool. Although there is an ongoing debate about the *percentage* of cases that could not be solved without a confession,²⁰ all concede that confessions are crucial in *some* cases.²¹ To prohibit a common form of interrogation—interrogation of a suspect in custody—would have frustrated solution in these cases and made solution considerably more difficult and time-consuming in other cases. Prohibiting custodial interrogation was therefore too costly to be seriously considered by the Court.²²

In place of a flat prohibition, the Court compromised: force the police “to dispel the compulsion inherent in custodial surroundings”²³ by requiring the police to advise the suspect of his rights and to honor any assertion of them.²⁴ This compromise was intended to limit custodial interrogation to those suspects who were willing to submit to it. Absent some indication of willingness, it was conclusively presumed that the suspect’s incriminating statements were compelled.²⁵

III. THE POLICE, THE COURT, AND THE ATTORNEY GENERAL

A. The Police

In 1975, a graduate student in Criminology took my Criminal Procedure course and elected to write a paper instead of sitting for the examination. His topic was the attitudes of the police toward the *Miranda* decision as reflected in the police literature.²⁶ What he found is not very surprising: considerable hostility in the years

20. The debate is sketched in 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 434–36 (1984).

21. *See id.*

22. An alternative—replacing police interrogation with judicial interrogation, see Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. 1024 (1934)—might have mitigated the cost. However, directing the states to substitute one form of interrogation for another would have been far more problematic than *Miranda*.

Another alternative—mandating the presence of counsel during interrogation, see Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 47–49 n.11 (1980); Schulhofer, *supra* note 19, at 881—would have been even more problematic, although for a different reason. Proposed in an *Amicus Curiae* Brief by the American Civil Liberties Union, see Y. KAMISAR, *supra*, the required presence of counsel would, in all likelihood, have lowered the rate of confession below a tolerable level. *Id.*; Grano, *supra* note 19, at 667. The Supreme Court recently indicated that it would not be disposed to require the presence of counsel during police interrogation. *See Moran v. Burbine*, 106 S. Ct. 1135, 1144 (1986) (*Miranda* does not require the police to advise a suspect that a lawyer has called to offer assistance.)

Other alternatives are canvassed in Caplan, *supra* note 18, at 1473–74. Professor Caplan suggests the following: (1) requiring that voluntariness be proved beyond a reasonable doubt rather than by a preponderance (a step that the Court refused to take in *Lego v. Twomey*, 404 U.S. 477 (1972); *see also Colorado v. Connelly*, 107 S. Ct. 515, 523 (1986)); (2) supplementing the involuntariness doctrine with certain per se prohibitions against inherently coercive behavior; (3) imposing a time limit on questioning; and (4) mandating compliance with state statutes requiring a prompt first appearance in court. It has also been suggested that police interrogations be taped or filmed. *See Herman, The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 498 n.263 (1964). From a constitutional law standpoint, most of these suggestions are at least as problematic as *Miranda*.

23. 384 U.S. 436, 458 (1966).

24. 384 U.S. 436, 467–79 (1966). That *Miranda* was a compromise rather than an all-out assault on the citadel of custodial interrogation has been recognized for years by commentators. *See* Y. KAMISAR, *supra* note 22; Kamisar, Book Review, 82 MICH. L. REV. 1074, 1077 (1984) (reviewing L. BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983)); Schulhofer, *supra* note 19. The Supreme Court itself has recently acknowledged the fact. *See Moran v. Burbine*, 106 S. Ct. 1135, 1144 (1986).

25. *Oregon v. Elstad*, 470 U.S. 298, 306–07 n.1 (1985); *id.* at 349–50 (Brennan, J., dissenting); *id.* at 364, 366–68 (Stevens, J., dissenting).

26. Schuster, “*You Have the Right to Remain Silent . . .*” (1975) (unpublished paper; copy on file with The Ohio State University College of Law Library).

immediately after *Miranda*, declining markedly with the passage of time.²⁷ He concluded that if the police had not accepted *Miranda*, they had at least learned "to live with it."²⁸ I have not surveyed the police literature since 1975, but I would be very surprised if the situation had changed.²⁹ Although the *Miranda* dissenters predicted that the decision would significantly impede law enforcement,³⁰ it has apparently not had this baleful effect.³¹ Consequently, the police have had little reason to feel threatened by it and their continued reconciliation to it is understandable. It is therefore one of law's small ironies that after the police adjusted to *Miranda*, the Supreme Court began to undermine it.

B. The Court

Miranda was a 5-4 decision. The opinion was written by Chief Justice Warren. Concurring were Justices Black, Douglas, Brennan and Fortas. Dissenting were Justices Clark, Harlan, Stewart and White. (As will be seen, it is important to note that one of the grounds of dissent was that the existing test for determining the admissibility of a confession worked well and there was no need for *Miranda*.³²) In 1967, Justice Clark was replaced by Justice Marshall, who certainly would have sided with the *Miranda* majority.³³ However, in 1969, Chief Justice Warren was replaced by Chief Justice Burger, and a year later Justice Blackmun assumed the seat of Justice Fortas. Both Burger and Blackmun would have been with the *Miranda* dissenters,³⁴

27. *Id.* at 17-18.

28. *Id.* at 18.

29. Early in 1987, my research assistant surveyed the police literature published since 1975. She found no attacks on *Miranda*. Outside the police literature, some law enforcement officials are quoted as having made their peace with *Miranda*. See Toobin, *Viva Miranda*, *NEW REPUBLIC*, February 16, 1987, at 11-12.

30. *Miranda v. Arizona*, 384 U.S. 436, 500-01 (1966) (Clark, J., dissenting); *id.* at 541-43 (White, J., dissenting).

31. Although "[p]otential for generalization is undercut by frequently inadequate or unrepresentative sample groups, by the lack of comparative data of police practices before *Miranda*, and by the differences in methods among the various projects," S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 1029 (3d ed. 1975), most of the studies tend to show that *Miranda* has not significantly affected the rate of confession, crime clearance and conviction. See O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* 169-74 (1973); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 *DEN. L.J.* 1 (1970); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 *MICH. L. REV.* 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 *U. PITT. L. REV.* 1 (1967); *Faculty Note, A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 *YALE L.J.* 300 (1967); *Project, Interrogation in New Haven: The Impact of Miranda*, 76 *YALE L.J.* 1519 (1967). Other studies are collected in White, *supra* note 18, at 19 n.99. Professor White rejects the assertion of Professor Caplan, *supra* note 18, at 1464, that it is "inaccurate" to say "that *Miranda* has had little effect on police efficiency."

32. *Miranda v. Arizona*, 384 U.S. 436, 502-03 (Clark, J., dissenting); *id.* at 505, 524 (Harlan, J., dissenting). See *id.* at 545 (White, J., dissenting).

33. Justice Marshall joined the "pro-*Miranda*" majority in one of the earliest post-*Miranda* cases, *Orozco v. Texas*, 394 U.S. 324 (1969), and has almost invariably taken a "pro-*Miranda*" position. See, e.g., *Colorado v. Connelly*, 107 S. Ct. 515, 525 (1986) (joined Justice Brennan's dissent from decision that mentally ill suspect waived *Miranda* rights); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (joined Justice Brennan's dissent from decision holding admissible a confession that followed an admission obtained in violation of *Miranda*); *New York v. Quarles*, 467 U.S. 649, 674 (1984) (dissented from creation of "public safety" exception to *Miranda*); *Oregon v. Bradshaw*, 462 U.S. 1039, 1051 (1983) (dissented from decision holding admissible a confession obtained after suspect asserted right to counsel); *North Carolina v. Butler*, 441 U.S. 369, 377 (1979) (joined Justice Brennan's dissent from decision that explicit waiver of *Miranda* rights is unnecessary); *Oregon v. Hass*, 420 U.S. 714, 724 (1975) (joined Justice Brennan's dissent from decision that confession obtained in violation of *Miranda* is admissible for impeachment).

34. Former Chief Justice Burger consistently voted to narrow the reach of *Miranda*. Justice Blackmun has been only slightly less consistent. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985) (both in majority); *New York v. Quarles*, 467 U.S. 649 (1984) (both in majority); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (Burger in plurality, Blackmun

and their appointments therefore shifted the balance against *Miranda*. The shift was strengthened in 1972 when Justices Black and Harlan were replaced by Justices Powell and Rehnquist.³⁵ At this point, one may reasonably assume, six justices believed that *Miranda* was not necessary.³⁶

In 1974, the Court decided the case of *Michigan v. Tucker*.³⁷ The Court held that it was permissible to use against the defendant the testimony of a witness who was discovered as a result of statements obtained from the defendant in violation of *Miranda*.³⁸ The holding is noteworthy because it seems to give the police an incentive to violate *Miranda*, but that is not why I mention it. Rather, I do so because of the clever way that Justice Rehnquist's majority opinion describes the requirements of *Miranda*. Early in his opinion, Justice Rehnquist stated:

For purposes of analysis in this case we believe that the question thus presented is best examined in two separate parts. We will therefore first consider whether the police conduct complained of *directly* infringed upon respondent's right against compulsory self-incrimination or whether it instead violated *only the prophylactic rules developed to protect that right*.³⁹

Subsequently, Justice Rehnquist characterized the requirements of *Miranda* as "protective guidelines,"⁴⁰ "recommended procedural safeguards,"⁴¹ "suggested safeguards,"⁴² and "prophylactic standards."⁴³ Do not underestimate the significance of these labels. Justice Rehnquist was saying that the fifth amendment is concerned only with physical or extreme psychological compulsion, that the fifth amendment does not mandate police to advise suspects, and that the requirements of *Miranda* are therefore nonconstitutional rules created by the Court which are entitled to less deference and which should be given less effect than the requirements of the Constitution.⁴⁴ The point of Justice Rehnquist's labeling was not lost on Justice Douglas:

joined in dissent); *North Carolina v. Butler*, 441 U.S. 369 (1979) (both in majority); *Oregon v. Hass*, 420 U.S. 714 (1975) (Blackmun wrote majority opinion, Burger joined).

35. See, e.g., *Colorado v. Connelly*, 107 S. Ct. 515 (1986) (Rehnquist wrote majority opinion, Powell joined); *Oregon v. Elstad*, 470 U.S. 298 (1985) (both in majority); *New York v. Quarles*, 467 U.S. 649 (1984) (Rehnquist wrote majority opinion, Powell joined); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (Rehnquist wrote plurality opinion, Powell wrote concurring opinion); *North Carolina v. Butler*, 441 U.S. 369 (1979) (Rehnquist in majority, Powell did not participate); *Oregon v. Hass*, 420 U.S. 714 (1975) (both in majority).

36. The six were Chief Justice Burger, Justices Stewart and White, who dissented in *Miranda*, and Justices Blackmun, Powell and Rehnquist.

37. 417 U.S. 433 (1974).

38. *Id.* at 450-52. The interrogation in *Tucker* occurred before *Miranda* was decided, but the trial occurred after *Miranda*. Consequently, *Miranda* was applicable to the interrogation, *Johnson v. New Jersey*, 384 U.S. 719 (1966), and *Tucker's* own statements to the police were inadmissible.

39. 417 U.S. 433, 439 (1974) (emphasis added).

40. *Id.* at 443.

41. *Id.*

42. *Id.* at 444.

43. *Id.* at 446.

44. That this was the gravamen of Justice Rehnquist's statement is apparent from the subsequent decisions in *New York v. Quarles*, 467 U.S. 649 (1984), discussed *infra* at notes 49-54 and accompanying text, and *Oregon v. Elstad*, 470 U.S. 298 (1985), discussed *infra* at notes 55-56 and accompanying text.

Tucker was not the first source to suggest that *Miranda's* rules were nonconstitutional. Title II of the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 3501 (1983), prescribes that a confession is admissible in a federal criminal case "if it is voluntarily given." In determining voluntariness, the trial judge must consider whether the *Miranda* warnings were given, but the failure to warn "need not be conclusive on the issue of voluntariness of the confession." *Id.*

The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the "requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment Privilege" . . . and without so holding we would have been powerless to reverse *Miranda's* conviction.⁴⁵

Justice Douglas, however, was a dissenter. The view of the majority was apparently that *Miranda's* requirements were nonconstitutional.

In the mid-70s, I used to tell my students that *Michigan v. Tucker* was the first salvo in a battle that might eventuate in the overruling of *Miranda*. I was wrong. The battle never took place. Although some lower courts relied on *Tucker* to support a narrow interpretation of *Miranda*,⁴⁶ it played no role in subsequent Supreme Court decisions in the 1970s.⁴⁷ Indeed, when Chief Justice Burger said in a 1980 concurring opinion, "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures. I would neither overrule *Miranda*, disparage it, or extend it at this late date,"⁴⁸ I thought that *Miranda* was reasonably secure. I was wrong again.

In 1984, the Court decided *New York v. Quarles*.⁴⁹ The opinion, also written by Justice Rehnquist, revived and used the labels of *Tucker*. A police officer entered a supermarket late at night in search of an armed suspect, saw him, chased him, lost sight of him, and eventually captured him in the rear of the market. When a search revealed that the suspect's holster was empty, the officer, without giving *Miranda*

On June 11, 1969, the Department of Justice sent to United States Attorneys a memorandum and cover letter setting out the Department's position on these provisions. The letter states:

Congress has reasonably directed that an inflexible exclusionary rule be applied only where the constitutional privilege against compelled self-incrimination itself has been violated, not where a particular protective safeguard has been violated without affecting the privilege itself.

Memo No. 584 Supplement No. 3, June 11, 1969, reprinted in 5 Crim. L. Rptr. 2350 (Aug. 9, 1969). In the accompanying memorandum, *Miranda* was referred to in the following terms: "a means, suggested by the Court, by which the accused's Fifth Amendment privilege may be safeguarded," *id.* at 2351; "a protective measure," *id.*; "specific warnings [which] are not themselves constitutional absolutes," *id.* at 2351-52; and a protective safeguard system," *id.* at 2352. The memorandum was drafted in the Office of Legal Counsel of the Department of Justice. It is of passing interest that lawyer William H. Rehnquist was head of that Office from 1969 until his appointment to the Supreme Court in 1972. See N.Y. Times, October 22, 1971, § 1, at 24, col. 1 (transcript of President Nixon's announcement of nomination).

45. 417 U.S. 433, 462-63 (1974) (Douglas, J., dissenting) (brackets in original).

46. See, e.g., *Simmons v. Clemente*, 552 F.2d 65, 69-70 (2d Cir. 1977) (witness' testimony admissible); *Hayes v. Cady*, 500 F.2d 1212, 1214-15 (7th Cir. 1973), cert. denied, 419 U.S. 1058 (1974) (tangible fruits admissible); *Stewart v. Florida*, 394 F. Supp. 849, 851 (S.D. Fla. 1975) (suspect's own statement admissible; *Miranda* violation dubious).

47. Between 1974 and 1983, *Tucker* was cited in but four majority opinions in cases involving the admissibility of confessions or admissions. In none of the cases was the rationale of *Tucker* significant to the outcome. See *Fare v. Michael C.*, 442 U.S. 707, 718 (1979); *United States v. Washington*, 431 U.S. 181, 187 (1977); *Brewer v. Williams*, 430 U.S. 387, 397 (1977); *Michigan v. Mosley*, 423 U.S. 96, 100 (1975). See also *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (impermissible to impeach defendant by proof that he remained silent after receiving *Miranda* warnings). In *Pennsylvania v. Romberger*, 417 U.S. 964 (1974), on facts apparently similar to *Tucker's*, the Court vacated and remanded for further consideration in light of *Tucker*.

48. *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C. J., concurring). The majority opinion in *Innis*, which gave *Miranda's* "interrogation" element a "rather generous definition," *Kamisar, Book Review, supra* note 24, at 1088, also demonstrated that *Miranda* was not moribund. The Court passed up an opportunity to limit "interrogation" to encounters in which the police (1) speak directly to the suspect, (2) intend to elicit an answer, or (3) speak rather than take provocative action such as displaying evidence. *Id.* at 1087. Instead, the Court defined "interrogation" to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. 291, 301 (1980) (footnotes omitted).

49. 467 U.S. 649 (1984).

warnings, asked where the gun was. The suspect's incriminating answer and the gun to which it led were held admissible in a 6-3 decision.⁵⁰ According to the majority, public safety required that the officer locate the gun.⁵¹ Although public safety would not justify the violation of a suspect's constitutional rights (for example, beating an answer out of the suspect),⁵² the *Miranda* warnings are not constitutionally required. Hence, the interest in public safety could trump *Miranda*. The linchpin of this analysis was, of course, *Michigan v. Tucker*.⁵³ The seedling that Justice Rehnquist planted in 1974 bore fruit in a decade.⁵⁴

Nine months later, it bore more fruit when the Court embraced both *Tucker* and *Quarles* in another 6-3 decision. In *Oregon v. Elstad*,⁵⁵ a police officer took a suspect into custody in his own home. Without advising the suspect, the officer questioned him, and the suspect admitted having been at the scene of a burglary. The officer then took the suspect to the police station, recited the warnings, obtained a waiver, and questioned the suspect further. The suspect confessed. At trial, the prosecution was permitted to use the subsequent confession, but not the initial admission. The Supreme Court held that this was correct. Had the initial admission been obtained in violation of the suspect's constitutional rights, the full confession would also have been inadmissible. But the initial violation implicated only *Miranda*'s nonconstitutional requirements, and it was therefore appropriate to apply a different rule.⁵⁶

Decisions such as *Tucker*, *Quarles*, and *Elstad* cut the doctrinal heart out of *Miranda*. They come close to saying that the *Miranda* Court went beyond its constitutional authority by imposing on the states doctrines that were not themselves required by the constitution. Do they mean that *Miranda* will be overruled? Not necessarily. There is no exact correspondence between logic and law, and there are also strong institutional pressures against overruling. But these cases increase the likelihood of overruling, and, in tandem with the efforts of the attorney general, may prove to be an irresistible force.

C. The Attorney General

Edwin Meese III became the Attorney General of the United States in February 1985. He brought impressive law enforcement credentials to the job: deputy district attorney in California, adviser to the Governor on clemency and extradition, director of a center for criminal justice policy and management, vice chair of the California

50. *Id.* at 659.

51. *Id.* at 655-58.

52. *Id.* at 655 n.5. Had an answer been beaten out of *Quarles*, the gun to which it led would have been inadmissible. See 1 W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 9.5, at 760-66 (1984).

53. 467 U.S. 649, 654 (1984).

54. An offshoot of that seedling was Justice O'Connor's concurring and dissenting opinion in *Quarles*. 467 U.S. 649, 660-74 (1984). Although taking the position that the suspect's incriminating statement was barred by *Miranda*, Justice O'Connor argued that the gun to which it led should be admissible. Important in her analysis was her perception of a difference between the privilege against compulsory self-incrimination and the protections of *Miranda*. *Id.* at 667-72.

55. 470 U.S. 298 (1985).

56. *Id.* at 304-09 (relying on both *Tucker* and *Quarles*).

Commission on Organized Crime, and professor of criminal law at the University of San Diego.⁵⁷

Within six months of taking office, he launched an attack on *Miranda*. On July 9, 1985, in a speech to the American Bar Association, he applauded the decision in *Elstad*, saying that it placed "the *Miranda* ruling in proper perspective, stressing its origin in the court rather than in the constitution."⁵⁸ On August 25, 1985, he stated during a nationally televised interview that *Miranda* was "infamous" and "wrong," and amounted to "inventing new law."⁵⁹ Repeating the argument of the *Miranda* dissenters, he asserted, "We hadn't had any need for that type of law . . . in about 175 years of history."⁶⁰ He went on to say:

I think the idea that the police cannot ask questions of the person who knows the most about the crime is an infamous decision.

I think if a person doesn't want to answer, that's their right. But you've had time after time all these ridiculous situations in which the police are precluded from asking the one person who knows the most about the crime.⁶¹

A few months later, in an interview with *U.S. News and World Report*, he reasserted that *Miranda* keeps the police from interviewing the person who knows the most about the crime, and that we had got along well without *Miranda* for 175 years.⁶² Asked why suspects, who may be innocent, should not have the protection of the right to counsel at interrogation, he replied that "[s]uspects who are innocent of a crime should. But the thing is you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect."⁶³

57. N.Y. Times, Jan. 23, 1984, § A, at 16, col. 6.

58. Address of The Honorable Edwin Meese III, Attorney General of the United States, before the American Bar Association, July 9, 1985, at 10 (copy on file with The Ohio State University College of Law Library).

59. The Washington Post, August 26, 1985, § A, at 6, col. 1.

60. *Id.*

61. *Id.*

62. U.S. NEWS & WORLD REPORT, October 14, 1985, at 67.

63. *Id.* Professor Yale Kamisar, who has influenced the modern law of interrogation more than any other scholar, see, e.g., *Moran v. Burbine*, 106 S. Ct. 1135, 1146 (1986); *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980), was moved to call the attorney general's remarks "really incredible."

If a first-year law student had said this, you'd really give them [*sic*] a tongue-lashing.

He's not that stupid. Obviously he knows that what he's saying is simply inconsistent with the most basic notions of criminal process He sounds like a comic-strip character in "Dick Tracy."

The Washington Post, Oct. 11, 1985, § A, at 6, col. 3, (omission in original).

The attorney general subsequently backed off. A spokesperson said, "Meese believes that one is innocent until proven guilty in our system [but] *Miranda* has had an impact in terms of enabling people who would have been found guilty in a criminal trial . . . to go free." *Id.* (omission in original). The meaning of this statement is not clear. If it was intended to assert that *Miranda* has had a significant effect on the rate of confession, conviction and crime clearance, it is not supported by the evidence. See authorities cited *supra*, note 31. If it was intended as a complaint that *Miranda* sometimes results in the exclusion of important evidence, it is true. It should be noted, however, that *Miranda* results in the exclusion of evidence only when the police have violated their obligation to give warnings or obtain a valid waiver.

The Justice Department has continued its assault on *Miranda*. In January 1987, the Department released a report that had been submitted almost a year earlier, sharply criticizing and urging the overruling of *Miranda*. OFFICE OF LEGAL POLICY, U.S. DEP'T. OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (Feb. 12, 1986). Relying heavily on *Tucker*, *Quarles*, and *Elstad*, the Report recommended that the Justice Department create and seek review of a case raising the issue of whether 18 U.S.C. § 3501, see *supra*, note 44, is constitutional. Justice Department officials were later quoted as saying that the attorney general supported the proposal. The Columbus Dispatch, Jan. 22, 1987, § A, at 8, col. 1. The Solicitor General, however, is apparently less enthusiastic. According to Legal Times, May 4, 1987,

As will appear from the balance of this article, I regard most of the Attorney General's complaints, particularly the complaint that we had got along well without *Miranda* for 175 years, as footless. Whether valid or not, however, the complaints come from the attorney general, the head of the United States Department of Justice, this country's chief law enforcement officer. For that reason alone they are significant. The Attorney General has in effect called for the overruling of *Miranda*. That call and the denigration of *Miranda* by *Tucker*, *Quarles*, and *Elstad* have to make one question the fate of *Miranda*, have to make one ask "what if?"

IV. WHAT IF *MIRANDA* WERE OVERRULED?

A. Introduction

Let me restate the questions I asked at the outset: What if *Miranda* were overruled—what test would courts use for determining the constitutional admissibility of confessions? How well would that test work? To these questions I want to add another. Is it true, as the *Miranda* dissenters and the Attorney General have said, that the law of confessions got along well for 175 years without *Miranda*? In order to answer these questions, it is necessary to consider what the law of interrogation was like in the good old days before *Miranda*. For reasons that will become apparent, I shall deal with the developments in reverse chronological order.

B. The Law Before *Miranda*

1. *Escobedo v. Illinois*

*Escobedo v. Illinois*⁶⁴ was decided two years before *Miranda*. The Court held inadmissible a confession obtained by custodial interrogation after the police refused to let a suspect see his lawyer who was at the police station. The Court held that the suspect's sixth amendment right to counsel had been violated,⁶⁵ but also noted that no one had advised the suspect of his rights under the sixth and fifth amendments.⁶⁶ From a doctrinal standpoint, *Escobedo* is a lineal ancestor of *Miranda*.⁶⁷ The line-up of Justices was the same in both cases,⁶⁸ and those who have criticized *Miranda* have also criticized *Escobedo*.⁶⁹ Thus, it is an absolute certainty that today's Supreme Court would not revert to *Escobedo* if it overruled *Miranda*.⁷⁰

p. 2, col. 1, "Solicitor General Charles Fried has scotched a proposal by aides close to Attorney General Edwin Meese III to ask a federal appeals court to overturn the Supreme Court's landmark 1966 ruling in *Miranda v. Arizona*."

64. 378 U.S. 478 (1964).

65. *Id.* at 491.

66. *Id.* at 483, 485, 491.

67. The kinship between *Escobedo* and *Miranda* is apparent from the *Miranda* opinion. See 384 U.S. 436, 440, 442, 465-66, 475 (1966).

68. The majority consisted of Chief Justice Warren and Justices Black, Douglas, Brennan and Goldberg. The dissenters were Justices Clark, Harlan, Stewart, and White.

69. See, e.g., Caplan, *supra* note 18, at 1437-43.

70. In *Frazier v. Cupp*, 394 U.S. 731 (1969), the Court held that *Escobedo* was inapplicable unless the suspect made a relatively unambiguous request for counsel. Since few unwarned suspects are likely to make any request for

2. *Massiah v. United States*

*Massiah v. United States*⁷¹ was decided a few months before *Escobedo* and was relied on in *Escobedo*.⁷² After *Massiah* had been indicted, federal agents induced a co-defendant to engage *Massiah* in conversations during which *Massiah* incriminated himself. In a 6–3 decision, the Court held that *Massiah*'s right to counsel under the sixth amendment had come into being at the time of indictment, and that the incriminating statements had been elicited in violation of the right.⁷³ As subsequent cases have insisted, the concerns of *Massiah* and *Miranda* are different.⁷⁴ The concern of *Massiah* is the proper functioning of the adversary system—the distance that one adversary has to maintain from the other, and the importance of adversaries communicating through, not behind the back of, counsel.⁷⁵ By contrast, the concern of *Miranda* is freedom from compulsory self-incrimination.⁷⁶ As a result of these differences, the *Massiah* right to counsel comes into play only after the government has demonstrated some commitment to prosecute the suspect.⁷⁷ The earliest stage at which the Supreme Court has found this commitment is the first appearance in court after the filing of preliminary charges.⁷⁸ That stage, however, comes after the ordinary police-station interrogation stage. Thus, the *Massiah* right to counsel is wholly inapplicable to a run-of-the-mill interrogation,⁷⁹ and could not be viewed by the Supreme Court as an alternative to *Miranda*. Moreover, many who have attacked *Miranda* have also attacked *Massiah*.⁸⁰ In their eyes, *Massiah* is not a part of the good old days. Rather, like *Escobedo*, it is an ancestor, although more remote, of *Miranda*.

3. *Wong Sun v. United States*

In *Wong Sun v. United States*,⁸¹ the Court held inadmissible a confession that

counsel, *Escobedo* gives virtually no protection in the vast majority of confession cases. Consequently, it could hardly be viewed as an appropriate check on police interrogation. Even if *Frazier* had not been decided, however, the Court would not revert to *Escobedo*. It is generally agreed that *Escobedo*'s reliance on a right-to-counsel rationale was but a halting step in the direction of *Miranda*'s self-incrimination theory, and that *Escobedo* today has no independent vitality, indeed, that it has been displaced by *Miranda*. See *Moran v. Burbine*, 106 S. Ct. 1135, 1146 (1986); Y. KAMISAR, *supra* note 22, at 162–63 and n.29; Kamisar, Book Review, *supra* note 24, at 1076. It is therefore clear that if *Miranda* were to fall, *Escobedo* would too.

71. 377 U.S. 201 (1964).

72. 378 U.S. 478, 484–86 (1964).

73. 377 U.S. 201, 205–06 (1964).

74. *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980).

75. *Maine v. Moulton*, 106 S. Ct. 477, 484, 487 (1985); *Brewer v. Williams*, 430 U.S. 387, 415 (1977) (Stevens, J., concurring).

76. *Moran v. Burbine*, 106 S. Ct. 1135, 1140, 1146 (1986).

77. *Id.* at 1147.

78. See *Brewer v. Williams*, 430 U.S. 387, 398–99 (1977).

79. *Moran v. Burbine*, 106 S. Ct. 1135, 1145–47 (1986).

80. Of the four *Miranda* dissenters, three (Justices Clark, Harlan, and White) had earlier dissented in *Massiah*. (The fourth, Justice Stewart, wrote the opinion in *Massiah*). Chief Justice Burger disparaged both *Miranda* and *Massiah* in his dissenting opinion in *Brewer v. Williams*, 430 U.S. 387, 416, 423, 424, 425 (1977). Justice Rehnquist, whose opinion in *Michigan v. Tucker*, 417 U.S. 433 (1974), undercut *Miranda*, later urged that *Massiah*'s "language, if not its actual holding should be re-examined." *United States v. Henry*, 447 U.S. 264, 290 (1980) (dissenting opinion). See also Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 U. MINN. L. REV. 47 (1964) (criticizing both *Massiah* and *Escobedo*).

81. 371 U.S. 471 (1963).

was the product of an arrest that violated the fourth amendment. The primary concern of *Wong Sun* is the constitutionality of custody, not what the police do to obtain a confession after the suspect is in custody.⁸² Consequently, although the *Wong Sun* doctrine bears on the admissibility of a confession, it is irrelevant to police interrogation tactics and thus cannot be a substitute for *Miranda*.

4. The McNabb-Mallory Rule

It is a requirement of federal criminal procedure that an arrestee be taken without unnecessary delay for a first appearance in court.⁸³ In a series of cases beginning in the 1940s, the Supreme Court held that a confession was inadmissible if obtained during a period of unnecessary delay.⁸⁴ The holdings, known as the *McNabb-Mallory* rule, sought to deal with the problem of abusive interrogation by the rather blunt device of depriving the police of time to interrogate.⁸⁵ The rule was not based on the Constitution.⁸⁶ Rather, it was based first on a federal statute⁸⁷ and later on Rule 5(a) of the Federal Rules of Criminal Procedure.⁸⁸ As a result, the rule was applicable only to federal cases, not to state cases.⁸⁹ Moreover, even in this limited context, it was all but destroyed by a provision of a 1968 federal statute which gives federal interrogators a grace period of six hours for interrogation.⁹⁰ This provision was enacted because it was felt that the *McNabb-Mallory* rule was too great an impediment to police interrogation.⁹¹ For all of these reasons, the rule could not and would not be regarded as an acceptable substitute for *Miranda*.

What I have just done is to take you on a brief excursion of four rules that antedated *Miranda*. The Supreme Court would regard none of these rules as a substitute for *Miranda*. If the Court overruled *Miranda*, none of these rules would come to the fore. What is left? The answer to this question is that the only remaining pre-*Miranda* rule is the involuntary confession rule.⁹² Unless the Supreme Court is disposed to create a new approach for police interrogation, it is likely that the Court would revert to this rule.⁹³

82. Of course, in determining whether a confession is the "product" of an unconstitutional arrest, courts are required to consider whether the police exploited the arrest. See *Brown v. Illinois*, 422 U.S. 590 (1975). However, this does not mean that the *Wong Sun* doctrine is, or was ever intended to be, a check on the methods of police interrogation. Rather, courts should consider, among other factors, the length of time between arrest and confession and whether there are circumstances intervening between arrest and confession that dissipate the taint of the unconstitutional arrest. See *id.* However, the giving of *Miranda* warnings does not *per se* dissipate the taint. *Id.*

83. Fed. R. Crim. P. 5(a).

84. For a discussion of the cases, including *McNabb* and *Mallory*, see Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958).

85. The reference is to *Mallory v. United States*, 354 U.S. 449 (1957), and *McNabb v. United States*, 318 U.S. 332 (1943).

86. W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 272 (1985).

87. *Id.* at 270.

88. *Id.*

89. *Id.* at 272.

90. *Id.* at 271-72. The statute is a provision of the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 3501(c) (1983).

91. See Recent Statute, 82 HARV. L. REV. 1392 (1969).

92. See generally W. LAFAVE & J. ISRAEL, *supra* note 84, at 262, 264-69.

93. It is unlikely that the Court would be willing to create a new constitutional law test for determining the

5. The Involuntary Confession Rule

a. Verbalization

It violates due process of law for the prosecution in a criminal case to use the defendant's involuntary confession against him.⁹⁴ Whether a confession is involuntary must be determined by considering the totality of the circumstances—the characteristics of the defendant and the environment and techniques of interrogation.⁹⁵ Under the “totality of the circumstances” approach, virtually everything is relevant and nothing is determinative.⁹⁶ If you place a premium on clarity, this is not a good sign.

b. Origin

The involuntary confession rule originated as a part of the English common law of evidence.⁹⁷ Its purpose was to exclude putatively unreliable evidence.⁹⁸ The Supreme Court adopted the rule for federal cases in 1884.⁹⁹ Prior to 1936, it was not clear whether the rule had any constitutional law dimension or was just a common law rule.¹⁰⁰ In that year, however, the Court for the first time held an involuntary confession inadmissible in a state criminal case.¹⁰¹ Since the Court lacks the authority to prescribe mere rules of evidence for state proceedings, it had to base inadmissibility on the Constitution. It chose the due process clause of the fourteenth amendment.

admissibility of confessions. Although other tests have been suggested from time to time, see note 22, *supra*, they are as problematic as *Miranda*, *id.*, and the court would hardly move in their direction.

Eight years ago, Professor Grano urged the adoption of a modified voluntariness rule. Grano, *supra* note 5. Under this modification, a confession would be involuntary only if a “hypothetical person of average or ordinary firmness” would yield to the particular pressure applied by the police. *Id.* at 899. The current voluntariness test suffers from intolerable vagueness, see *infra*, notes 94–160, and accompanying text, and the suggested modification gives no greater clarity to the law or guidance to police officers and judges. See Schulhofer, *supra* note 19, at 873–77. On the other hand, a court might be attracted to it because it gives suspects less protection than the current test. See Grano, *supra* note 5, at 901–09.

Colorado v. Connelly, 107 S. Ct. 515 (1986), suggests that the Court is satisfied with the current voluntariness rule. The defendant confessed as a result of hearing the voice of God commanding him to confess or to commit suicide. *Id.* at 519. In a 7-2 decision, the Court held that a confession is voluntary if it is not produced by police coercion even though the suspect has a serious mental disorder. “Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent’s present claim be sustained.” *Id.* at 521. The Court was not disposed to establish a new and more lenient test for determining voluntariness because the exclusionary rule “‘imposes a substantial cost on the societal interest in law enforcement by its prescription of what concededly is relevant evidence.’” *Id.* On the other hand, nothing in the opinion precludes a consideration of a suspect’s peculiarities as long as there is police coercion. Indeed, the Court observed that “‘certain interrogation techniques, either in isolation or as applied to the *unique characteristics of a particular suspect* are so offensive to a civilized system of justice that they must be condemned.’” *Id.* at 520 (emphasis added) quoting from *Miller v. Fenton*, 106 S. Ct. at 445, 449 (1985). The quotation necessarily is a rejection of Professor Grano’s objective theory.

94. W. LAFAYE & J. ISRAEL, *supra* note 84, at 265.

95. *Id.* at 263, 266.

96. Grano, *supra* note 5, at 907. This common characterization of the rule ignores cases in which single factors seem to have dictated the result. See *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 consecutive hours of interrogation); *Brown v. Mississippi*, 297 U.S. 278 (1936) (brutal physical force).

97. Herman, *supra* note 22, at 452–53 n.17.

98. *Id.*

99. *Id.* at 453.

100. See W. LAFAYE & J. ISRAEL, *supra* note 84, at 264–65.

101. *Brown v. Mississippi*, 297 U.S. 278 (1936).

c. *The Meaning of "Voluntary" and "Involuntary"*

Stating what the rule is and how it originated and developed leaves out the most important matter. If the words "voluntary" and "involuntary" describe admissible and inadmissible confessions, it is crucially important to define these terms. This definitional task can be approached from at least three directions: using the definition found in judicial opinions, extrapolating or inferring a definition from the facts and results of cases, and inferring a definition from the goals or objectives of the rule.

(1) *Using the Definition Found in Judicial Opinions*

The involuntary confession rule received its greatest development and direction between 1936 and 1963.¹⁰² In 1973, in the case of *Schneckloth v. Bustamonte*,¹⁰³ the Court surveyed what it had done. (I am tempted to say that it surveyed the wreckage, but that remains to be seen). It began by acknowledging that "[t]he notion of 'voluntariness' . . . is itself an amphibian."¹⁰⁴ (If you will think about this statement for a moment, you will see that it is another bad sign). Then it posed and rejected two diametrically different definitions of "voluntary." Under the first, any confession is voluntary if made during consciousness, even if made to avoid torture.¹⁰⁵ This definition would result in the admissibility of virtually every confession. Under the second definition, a confession is voluntary only if volunteered, that is, only if made without any police inducement or effort such as interrogation.¹⁰⁶ This definition would make most confessions inadmissible. Having rejected the extremes, the Court was forced toward the middle. It said, "[T]he ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice."¹⁰⁷ If you attend closely to this definition, you will immediately see how problematic it is. The words "free" and "unconstrained" are hardly terms of legal art. In nonlegal discourse, moreover, they have no clear meaning. Beyond, that, however, the Court is not even using the words in an absolute sense. The question, according to the Court, is not whether the defendant's choice was free or unconstrained, but whether it was "essentially" free or unconstrained. Presumably, "some" constraint is permissible as long as it does not destroy the "essence" of freedom of choice. I am being picky about the words the Court used because I want you to see three related points. The first is that the Court's definition permits the police to interrogate a reluctant suspect—one who would rather not be interrogated—and to put some pressure on the suspect to get a confession. If the police get a confession, it will be admissible as long as the police did not go too far. The second point I want you to see is that the Court's definition gives us no clear criterion for determining whether

102. Herman, *supra* note 22, at 457 n.49.

103. 412 U.S. 218 (1973).

104. *Id.* at 224, quoting *Culombe v. Connecticut*, 367 U.S. 568, 604-05 (1961).

105. 412 U.S. 218, 224 (1973).

106. *Id.*

107. *Id.* at 225.

the police did go too far in a particular case. The third point is that the involuntary confession rule is a compromise between the individual's interest in being free from any pressure to confess and society's interest in solving crimes.¹⁰⁸ Indeed, the very fact that the involuntary confession rule is a compromise probably accounts for the vagueness of the Court's definition of voluntariness. Whatever the reason, however, it is perfectly plain that the Court's statement is not helpful and that we must look elsewhere for the definitions of "voluntary" and "involuntary."

(2) *Extrapolating or Inferring a Definition from the Facts and Results of Cases*

A second technique for ascertaining a definition is to look closely at the facts and results of a group of cases and ask, "What definition must the Court be using to get these results on these facts?" As a basis for using this technique, I have chosen four cases, one from each of the first four decades in which the involuntary confession rule has been applied to state cases.

The first of these cases is *Brown v. Mississippi*,¹⁰⁹ which is also the first state case in which the United States Supreme Court held a confession inadmissible. The three defendants were poorly educated black men. One was taken into custody by a deputy sheriff and other persons. When he protested his innocence, he was twice hanged from a tree limb. When he continued to protest his innocence, he was tied to the tree and whipped. Still not having confessed, he was then released. A day or two later, the same deputy arrested the defendant and drove him to jail by a route that went through Alabama. While in Alabama, the deputy severely whipped the defendant and said that he would continue to do so until the defendant agreed to confess to a statement that the deputy would dictate. The defendant confessed.¹¹⁰

The other two defendants were arrested, made to strip, and whipped with a leather strap and buckle until they confessed to every detail of a confession provided by the deputy. They were threatened with additional force if they recanted.¹¹¹

The next day, all three defendants were brought before the sheriff and others and repeated their confessions. The repeated confessions were used against them at trial and they were convicted of murder and sentenced to death.¹¹² The United States Supreme Court unanimously reversed the convictions, holding that the use of confessions obtained under "compulsion by torture"¹¹³ violated due process of law.¹¹⁴ Although the Court did not explicitly refer to the involuntary confession rule or cite any involuntary confession case, *Brown* is generally regarded as the beginning of the modern era of the involuntary confession rule.¹¹⁵

108. "This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither liberty nor security. The due process clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect." *Id.*

109. 297 U.S. 278 (1936).

110. *Id.* at 281-82.

111. *Id.* at 282.

112. *Id.* at 282-84.

113. *Id.* at 285.

114. *Id.* at 286.

115. W. LAFAVE & J. ISRAEL, *supra* note 84, at 265. That "compulsion by torture" has not been wiped out is shown by *People v. Wilson*, 116 Ill. 2d 29, 506 N.E.2d 571 (1987). A unanimous court held that the State had failed to prove

The second case is *Ashcraft v. Tennessee*.¹¹⁶ The defendant, a 45-year-old caucasian, had overcome a meager education to achieve a measure of financial success as a skilled construction worker. Suspected of complicity in the murder of his wife, he was arrested and interrogated for thirty-six consecutive hours by relays of interrogators. As each group of interrogators became exhausted, it was replaced by a new group. As Ashcraft became exhausted, he was not replaced by a surrogate suspect. Eventually he confessed, was convicted, and was sentenced to long-term imprisonment.¹¹⁷ In a 6-3 decision, the Supreme Court reversed, holding that the confession was involuntary.¹¹⁸ Using the language of presumptions in an apparent departure from the "totality of the circumstances" approach, the majority stated that thirty-six hours of relay interrogation was "inherently coercive."¹¹⁹

The third case is *Spano v. New York*.¹²⁰ Spano was a foreign-born, 25-year-old man with a junior high school education. He had a history of emotional instability, and had been found unfit for military service after failing an intelligence test. After being indicted for murder, Spano hired a lawyer and surrendered to the police. For the next eight hours, he was continuously interrogated by various persons in two different locations. He repeatedly asked to see his lawyer, but his requests were denied. Not having obtained a confession, the authorities enlisted the services of a probationary officer, Bruno, whom Spano had known since childhood and whom Spano had telephoned shortly before he surrendered. Bruno was instructed to pretend that Spano's telephone call had got him into trouble, that he might lose his job, and that he, his pregnant wife, and their three children would suffer unless Spano confessed. After the fourth entreaty by Bruno, Spano confessed.¹²¹ The Supreme Court held that Spano's will had been overborne and that his confession was involuntary and inadmissible.¹²²

The fourth case is *Haynes v. Washington*.¹²³ Haynes was a skilled sheet-metal worker, about 30 years old, "of at least average intelligence, who, in the eleven years preceding his trial, had been convicted of drunken driving, resisting arrest, being without a driver's license, breaking and entering, robbery, breaking jail, and taking a car."¹²⁴ After a filling station robbery, Haynes was briefly interrogated on the street and then released. Seconds later, he returned to the police car, admitted his guilt, and identified the filling station. He was taken to the police station where he again admitted his guilt during a thirty-minute interrogation. The next morning, he made two more confessions both of which were transcribed. He refused to sign the

that injuries to a suspect's head, torso and leg, inflicted while the suspect was in police custody, were sustained after the suspect had confessed rather than during the interrogation.

116. 322 U.S. 143 (1944).

117. *Id.* at 154.

118. *Id.* at 144, 148-51.

119. *Id.* at 154.

120. 360 U.S. 315 (1959).

121. *Id.* at 316-19.

122. *Id.* at 323-24.

123. 373 U.S. 503 (1963).

124. Herman, *supra* note 22, at 455-56.

transcript of the later confession, but did sign the earlier transcript.¹²⁵ Prior to signing, "he had been held incommunicado for about sixteen hours, contrary to state law, and, although he had requested permission to call his wife on the morning following the arrest, he was told that 'when I had made a statement and cooperated with them that they would see to it that as soon as I got booked I could call my wife.'"¹²⁶ Notwithstanding the fact that Haynes made no claim of physical abuse, lack of sleep or food, or prolonged interrogation,¹²⁷ the Supreme Court in a 5-4 decision, held that his will had been overborne by the "express threat of continued incommunicado detention,"¹²⁸ and that the signed confession was therefore inadmissible.

The four cases I have just mentioned are alike in one respect: the confession was held involuntary and inadmissible in each. In all other respects, they are dissimilar. They involved suspects with different personal characteristics and they run a huge gamut of police interrogation tactics from the brutal beatings in *Brown* to "so mild a whip"¹²⁹ as the incommunicado detention in *Haynes*. These very differences make it hard for us to extrapolate or infer a definition of involuntariness from the facts and results of these cases. If a definition is to be found, we must look elsewhere.¹³⁰

(3) *Inferring a Definition from Goals or Objectives*

The third and final approach to the definitional problem is the functional approach: to try to infer a definition from the goals or objectives that the Court has attributed to the involuntary confession rule. A careful reading of the Court's more than forty involuntary confession cases discloses not one but five different objectives. I am not saying that every objective appears in every case. That is not so. But it is so that five objectives can be extracted from the entire body of Supreme Court cases. The objectives are: (1) to deter the police from engaging in conduct that may produce an unreliable confession;¹³¹ (2) to deter the police from engaging in conduct so offensive to the minimum standards of a civilized society that it shocks the conscience of the Court;¹³² (3) to deter the police from engaging in less-than-shocking misconduct;¹³³ (4) to deter the police from using the techniques of an inquisitorial

125. 373 U.S. 503, 505-06 (1963).

126. *Id.* at 509.

127. *Id.* at 523 (Clark, J., dissenting).

128. *Id.* at 514.

129. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

130. It may be argued that the Court is necessarily using the narrowest definition that would support holding a confession involuntary on the weakest set of facts presented to the Court—the facts of *Haynes*. The problem with this mode of analysis is that it makes the definition of involuntariness so fact-specific that the definition will be useless if the next case involves different facts, as it inevitably will. It is therefore fruitless to try to infer or extrapolate a definition from the facts and results of cases.

131. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 518-19 (1986); W. LAFAVE & J. ISRAEL, *supra* note 84, at 265.

132. See *Colorado v. Connelly*, 107 S. Ct. 515, 520 (1986); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1959); *Rochin v. California*, 342 U.S. 165, 172-73 (1952)(dictum).

133. In cases in which the conduct of the police could hardly be regarded as falling below the minimum standards of a civilized society, the Court has nevertheless alluded to police illegality. For example, in *Spano v. New York*, 360 U.S. 315, 320-21 (1959), the Court said:

The abhorrence of society to the use of involuntary confession does not turn alone on their inherent

system and to encourage them to use the techniques of an accusatorial system;¹³⁴ and (5) to deter the police from overbearing the suspect's will.¹³⁵

Your initial reaction may be that these objectives at last give us the definitional tool we need. Precisely the opposite is true, however. Each of the objectives is problematic in one or more ways, and the very number of them obfuscates rather than clarifies.

Look first at the unreliability and shocking misconduct objectives. Each is a traditional due process concern¹³⁶ and each will explain a case such as *Brown* or perhaps *Ashcraft*. But neither objective will explain *Spano* or *Haynes*. It is highly unlikely that the confession in either case was false and also unlikely that the police tactics would produce false confessions in other cases. Moreover, whatever one may think of the tactics in *Spano* and *Haynes*, it is not easy to argue that they offend the minimum standards of a civilized society and therefore shock our conscience. Thus, these themes, although part of traditional due process analysis, are too narrow to explain the range of cases in which confessions have been held involuntary.¹³⁷

The remaining themes are even more troublesome. The Court has said in some cases that the police must obey the law while enforcing the law, thus suggesting that a purpose of the involuntary confession rule is deterring violations of law that fall short of being profoundly shocking.¹³⁸ However, the Court has never made clear

untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

This suggests that one purpose of the involuntary confession rule is to deter illegal police conduct even though the conduct is not fundamentally unfair or shocking to the Court's sense of justice.

134. *Rogers v. Richmond*, 365 U.S. 534, 540 (1961).

135. *Colorado v. Connelly*, 107 S. Ct. 515 (1986); *Haynes v. Washington*, 373 U.S. 503 (1963).

136. In connection with unreliability as a due process concern, see *Chambers v. Mississippi*, 410 U.S. 284, 294, 295, 302 (1973) (denial of opportunity to cross-examine adverse witness and to introduce reliable exculpatory hearsay evidence); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (unnecessarily suggestive identification); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (prosecution's knowing use of perjured testimony); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (indigent's right to timely appointment of counsel in capital case); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (trial by judge with financial interest in convicting defendant); *Moore v. Dempsey*, 261 U.S. 86 (1923) (trial under influence of mob domination); *Grano*, *supra* note 5, at 919-22. The Supreme Court has recently made clear, however, that a putatively unreliable confession is not per se inadmissible as involuntary. Rather, coercive police activity is a required predicate. *Colorado v. Connelly*, 107 S. Ct. 515 (1986).

In connection with shocking misconduct as a due process theme, see *Rochin v. California*, 342 U.S. 165, 172 (1952) (forcing emetic into suspect and pumping his stomach); *Betts v. Brady*, 316 U.S. 455, 462, 473 (1942) (dictum) (right to counsel), *overruled on other grounds*, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *W. LaFAVE & J. ISRAEL*, *supra* note 84, at 43.

137. A complicating factor is that the reliability theme lacks a clear focus. "[T]he confession cases do not indicate clearly whether the due process inquiry should focus on the likelihood of unreliability in a particular case or on the general risk of unreliability created by a given stratagem." *Grano*, *supra* note 5, at 921. See *id.* at 922; *Y. KAMISAR*, *supra* note 22, at 20-24. The Court has recently noted that the shocking misconduct theme deals with interrogation techniques that, "either in isolation or as applied to the unique characteristics of a particular suspect are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 106 S. Ct. 445, 449 (1985). It remains to be seen whether this statement will be applied to the reliability theme of the involuntary confession rule.

An additional uncertainty plagues the reliability theme. It is not clear whether this theme is concerned to avoid only the wholly false confession or whether it also seeks to avoid confessions that are partly false. According to some commentators, the answer is the former. See authorities collected in *Herman*, *supra* note 22, at 454 n.25. For arguments that partial unreliability may be the greater risk, see *id.*; *Saltzburg*, *supra* note 18, at 24.

138. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *Grano*, *supra* note 5, at 923-24.

whether it was referring to state or federal law, to common, statutory or constitutional law.¹³⁹ In short, it has never identified the broken law, and thus has given the police no guidance. It is true that many of the Court's involuntary confession cases probably involved a violation of statutes that require a prompt first appearance. However, it is hard to see why a statutory violation should necessarily be treated as offending due process.¹⁴⁰ This objective, therefore, raises more questions than it answers.

The dichotomy between an accusatorial and an inquisitorial system is at least as problematic. In the first place, the line between the two systems is far from clear.¹⁴¹ Thus, it is of little help to be told that our system is accusatorial and that the police must adhere to its standards. Moreover, as actually administered by the Supreme Court, the standards of an accusatorial system apparently do not prohibit the police from arresting suspects who would rather not be arrested, from interrogating them although they would rather not be interrogated, and from subjecting them to some pressure to confess. Of course, the police cannot go too far, but the standards of an accusatorial system do not tell us how far that is. Thus, once again we find statements that are too imprecise to be useful.¹⁴²

The free will theme is similarly bereft of guidance. I explored this point earlier when I discussed the *Schneekloth* case,¹⁴³ and it is not necessary to repeat the discussion here.

A few minutes ago, I raised a question: under the Supreme Court's involuntary confession rule, what is the meaning of the words "voluntary" and "involuntary?" In an effort to answer this question, I used three standard analytical tools—the Court's verbalization of a definition, extrapolating or inferring a definition from the facts and results of cases, and inferring a definition from the objectives of the involuntary confession rule. None of these approaches is very useful. One can say with some confidence that a confession is involuntary if obtained by a brutal beating, as in *Brown*, or by prolonged and uninterrupted interrogation, as in *Ashcraft*. But beyond these extreme situations, little can be said. Since the rule requires us to consider the totality of the circumstances, a slight change in the facts may change the result. Thus, today's decision is of limited utility in guiding tomorrow's practices and decisions.

139. See cases cited *supra* note 138.

140. This point is convincingly made in Grano, *supra* note 5, at 923–24.

141. See Grano, *supra* note 5, at 934; See also Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 22–24 and n.148 (1979).

142. A major difference between our accusatorial and an inquisitorial system is that in our accusatorial system the privilege against self-incrimination plays a more prominent and protective role. See *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). The privilege, however, protects only against "compelled" self-incrimination, and "compelled" is no clearer than "involuntary." Thus, it hardly helps to say that an "involuntary" confession is one that has been obtained by methods that offend accusatorial precepts.

143. *Supra*, notes 103–08, and accompanying text. The Court recently roiled the muddy waters by holding in *Colorado v. Connelly*, 107 S. Ct. 515 (1986), that the defendant's confession was voluntary even though, as a result of mental disease, he heard the voice of God commanding him either to confess or to commit suicide. The defendant's lack of free will was deemed irrelevant unless caused by police coercion. Thus, the Court linked the free will theme, which is problematic in its own right, to the equally problematic theme of police misconduct.

Legal rules are addressed to audiences. If the rules are vague, the audiences suffer. The audiences for the involuntary confession rule are police officers who interrogate and obtain confessions, lawyers who try criminal cases, and judges who decide them. Of these three audiences, the lawyers suffer least. They have the advantage of being advocates. They know the result they want to reach and they will often try to match the facts of their case as closely as possible to the facts of some favorable precedent without paying too close attention to the subtleties of doctrine. The police and judges, on the other hand, are in a different situation. The police have to decide during the course of an interrogation what tactics to use and how far to go with them. Judges have to decide whether the police went too far. If the law governing these decision-making processes is vague, and it is, these processes will suffer. They will also suffer in another way. Police officers want to obtain confessions and are willing to go to the brink to get them. A few officers are willing to go beyond. Although even the most precise rules will not deter an officer who is strongly motivated to ignore them, vague rules encourage violation.¹⁴⁴ If a rule is vague, the officer can always say with plausibility, "I thought I was permitted to do it." So also with judges. Trial judges do not want to exclude evidence that the prosecution needs for a conviction, particularly when they believe that the evidence is reliable, and appellate judges are reluctant to overturn convictions and order retrials with attendant expense and delay. The vaguer the standards, the easier it is for judges to act on their impulses in doubtful or marginal cases.¹⁴⁵

Lest you think I overstate the case, I want to share with you the words of a person who is well known for his expertise in criminal procedure and constitutional law—Professor Joseph Grano of Wayne State University. Professor Grano is no friend of *Miranda*; he believes it was wrongly decided. Nevertheless, in an article that urges the overruling of *Miranda*, he refers to the "intolerable uncertainty that characterized the thirty-year reign of the due process voluntariness doctrine in the law of confessions."¹⁴⁶ Recent cases bear out this observation. Although *Miranda* has largely replaced the involuntary confession rule, the latter still exists; it was not overruled by *Miranda*.¹⁴⁷ Cases do arise in which it is claimed that a confession, apart from *Miranda*, was involuntary, and courts, as they did in the pre-*Miranda* days are still holding confessions admissible in doubtful or marginal cases. Let me give you five examples.¹⁴⁸

144. See Schulhofer, *supra* note 19, at 869. The analogy to vagueness in criminal statutes should not be overlooked. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW 94–95 (2d ed. 1986).

145. See Schulhofer, *supra* note 19, at 869–70. Moreover, even if the judge has good intentions, the very vagueness of the rules may make it hard to say that the police or a lower court erred. *Id.* at 870.

146. Grano, *supra* note 5, at 863. See also *id.* at 863 n.20; *id.* at 864 nn.25–27; Schulhofer, *supra* note 19 at 867–78; White, *supra* note 18, at 10–16. For an effort to defend the involuntary confession rule, see Caplan, *supra* note 18, at 1432–35. Professor Caplan regards the vagueness of the rule as "shrewd and responsible pragmatism." *Id.* at 1434.

147. See Schulhofer, *supra* note 19, at 877. The involuntary confession rule, but not *Miranda*, governs non-custodial interrogation by the police. *Id.* The involuntary confession rule also governs cases of custodial interrogation in which *Miranda* has been complied with and the suspect decides to waive. Whether the suspect's answers are admissible depends on whether they are voluntary.

148. In addition to the examples set out in the text, see the cases collected in Schulhofer, *supra* note 19, at 876 n.52; White, *supra* note 18, at 12–15 and nn.67, 70–73.

The first is *State v. Waugh*.¹⁴⁹ During an interrogation about a murder, Waugh claimed that the victim had died of a heart attack in Waugh's car and that in a panic he had dumped the deceased's body. Thereafter, Waugh asked at least three times to telephone his wife. The police denied all requests, thus keeping him incommunicado. Waugh then underwent a polygraph test. The examiner told him that he had truthfully admitted being an alcoholic but that he had falsely denied killing the deceased. The examiner then said that he wanted to help Waugh by getting him treatment for his alcoholism. After many such statements, Waugh finally confessed. Although this case bears remarkable resemblance to *Haynes v. Washington*,¹⁵⁰ the Kansas Supreme Court held that it was distinguishable. In *Haynes*, the police told the defendant that he would have to confess before he would be allowed to call his wife. In *Waugh*, however, no such statement was made; the police merely denied the suspect's requests. Thus, the confession was "voluntary."

The second case is *Vance v. Bordenkircher*,¹⁵¹ in which the court held voluntary a confession made by a 15-year-old who had an IQ of sixty-two and a mental age of nine. The confession was made after nine hours of intermittent interrogation, without counsel or other support.

The third example is *United States ex rel. Cerda v. Greer*.¹⁵² A 16-year-old suspect was arrested at 1:00 a.m. and was questioned at 4:00 a.m., 9:00 a.m., noon, and 6:00 p.m., for about thirty-five minutes per session. A police officer told him to tell the truth or he would "get his ass kicked."¹⁵³ His confession was held voluntary and admissible.

The penultimate example is *Martin v. Wainwright*.¹⁵⁴ In this case, Martin was sentenced to death based in part on his confession. He was interrogated for five hours after the police refused to honor his request that the interrogation be put off for a day. During the interrogation, one detective played the "bad guy," yelling and cursing at Martin. Another detective and an assistant prosecutor played the "good guys," feigning sympathy and promising to get psychiatric assistance for him. The assistant prosecutor told Martin that Florida had a bifurcated proceeding in capital cases, and that, although a confession would not help him in the guilt-determining phase, it would help him in the sentencing phase. The Florida courts and the federal courts held that the confession was voluntary and admissible.

The final case is *State v. Jenkins*,¹⁵⁵ also a death case. Approximately one-half hour before the police questioned him, Jenkins was taken to a hospital emergency room in deep shock from a gunshot wound in his chest and spinal cord which left him paralyzed. He was in pain, and a tube had been inserted into his chest to relieve

149. 238 Kan. 537, 712 P.2d 1243 (1986).

150. 373 U.S. 503 (1963), discussed *supra*, at notes 123-28, and accompanying text.

151. 692 F.2d 978 (4th Cir. 1982), *cert. denied*, 464 U.S. 833 (1983).

152. 613 F. Supp. 1120 (N.D. Ill. 1985).

153. *Id.* at 1122.

154. 770 F.2d 918 (11th Cir. 1985), *modified and reh'g denied*, 781 F.2d 185 (11th Cir.), *cert. denied*, 107 S. Ct. 307 (1986).

155. 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), *cert. denied*, 472 U.S. 1032, *reh'g denied*, 106 S. Ct. 19 (1985). I consulted with the attorney who represented the defendant in the Ohio appellate courts, so I am not merely a spectator as far as this case is concerned.

pressure from fluid buildup. His blood pressure had been very erratic although it was apparently beginning to stabilize. He had a low IQ and had been in a class for slow learners. Although he was going nowhere, the police questioned him and obtained a confession. The Ohio Supreme Court held that the confession was voluntary and admissible and it affirmed the conviction and death sentence.¹⁵⁶

These cases, although all decided in recent years, are remarkably representative of the cases that were decided earlier—in the good old days of police interrogation before *Miranda*. Small wonder, then, that in a period of thirty years or so, the Supreme Court granted review in over thirty-five cases in which confessions had been held voluntary.¹⁵⁷ Small wonder, too, that the Court reversed the conviction in most of these cases.¹⁵⁸ And small wonder that the Court became disaffected from its own work product.¹⁵⁹ All students of the Court recognize that it cannot police the application of doctrine by lower courts.¹⁶⁰ All it can hope to do is make doctrine intelligible and give illustrative examples. The Court tried to do that in the confession cases, and it failed. Given the inherent vagueness of the crucial concepts and the

156. In many respects, *Jenkins* is similar to *Mincey v. Arizona*, 437 U.S. 385 (1978), in which the Court held the confession involuntary. Although both cases involved the interrogation of a seriously wounded suspect in a hospital, the Ohio Supreme Court in *Jenkins* distinguished *Mincey* primarily on the ground that the interrogation in *Mincey* lasted considerably longer and that certain indicia of untrustworthiness in *Mincey* were absent in *Jenkins*. 15 Ohio St. 3d at 232, 473 N.E.2d at 321.

The five cases discussed in the text were the only cases that I referred to in the Kennedy Lecture to illustrate the proposition that the involuntary confession rule continues to work poorly. However, a case that was decided after the lecture was given may illustrate the point better than any I discussed. The case is *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986), *on remand from* 106 S. Ct. 445 (1985). At about 11:00 p.m., the police interrogated the suspect at his place of employment for about forty-five minutes, but the suspect denied involvement in a murder. He agreed to accompany his interrogators to a state police barracks. At the barracks, he was placed in isolation under guard for about an hour. At 1:47 a.m., another interrogation began. After being interrogated for fifty-three minutes, the suspect confessed. The interrogation involved intense nagging, wheedling and cajoling. The officer suggested repeatedly that the crime was the product of mental disease for which the suspect needed treatment and that the officer's only interest was in helping the suspect. The officer explicitly promised psychiatric assistance, and some of the officer's statements implied that the suspect would not be prosecuted. Immediately upon confession, the suspect collapsed in a trance and was taken to a hospital. In a 2-1 decision, the court held the confession voluntary and admissible.

The *Miller* case is quite unusual and compelling in one respect: the second interrogation was tape recorded and the entire transcript is appended to the dissenting opinion. In addition, selected portions of the transcript are highlighted in the majority and dissenting opinions. I cannot do justice to the facts of the case without reproducing the entire transcript. Consequently, I urge interested readers to consult the opinions and make up their own minds. Even a cursory reading will force one to agree with the Supreme Court's characterization of voluntariness as "an amphibian." See note 104, *supra*. Indicative of the amphibian's slipperiness is the fact that of the fifteen judges who considered the voluntariness issue in *Miller*, eight believed the confession was voluntary and seven involuntary.

For other dubious holdings that a confession was voluntary, see *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984) (Kidnapping suspect was arrested and beaten by police until he disclosed victim's location. Taken to jail, he was advised of rights, questioned some time after beating occurred, and confessed. The interrogators had not been at the scene of the beating. The confession was held not to be the product of the prior beating.); *People v. Kincaid*, 87 Ill. 2d 107, 429 N.E.2d 508 (1981), *cert. denied*, 455 U.S. 1024 (1982) (Suspect was interrogated while naked, after he had attempted suicide and had been given a major tranquilizer which could have caused lethargy and confusion.); *Mayer v. State*, 618 P.2d 127 (Wyo. 1980) (Confession to homicide not rendered involuntary by suspect's youth (age 17), isolation from parental advice and support, emotional upset, intoxication, and pain from an earlier beating by the intended victim.)

157. See Comment, 31 U. CHI. L. REV. 313 n.1 (1964).

158. *Id.*

159. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 523-24 (6th ed. 1986); *id.* at 524, quoting Justice Black as remarking during the oral arguments in *Miranda*,

[I]f you are going to determine [the admissibility of the confession] each time on the circumstances, [if] this Court will take them one by one [it] is more than we are capable of doing.

160. See *supra* note 157. See also Herman, *supra* note 22, at 457.

many rationales underlying the rule, failure was foreordained. So also was the search for an alternative.

Please do not misunderstand what I am saying. I am not saying that *Miranda* was correctly decided. I happen to believe that it was, but that is beside the point. The point is that the dissenters in 1966 and the Attorney General in 1985 were simply wrong in their claim that we got along well with the law that antedated *Miranda*. We did not, we are not getting along well with its vestiges today, and recognition of these simple facts should inform any reasonable debate about whether *Miranda* should be overruled.

I want to leave you with a few questions. Why all the fuss? After all, most of these people are guilty anyway, aren't they? So why should we care how the police get the confessions that establish their guilt? These are troubling questions, and they deserve an answer. I want to suggest three. First, even accepting for the sake of argument that the suspect is guilty, it is important to determine the degree of guilt. Frequently, this determination is based on the perpetrator's mental state at the time of the offense.¹⁶¹ Mental state is ordinarily a subjective phenomenon, and the words a suspect uses to describe it may therefore be crucially important.¹⁶² I have both prosecuted and defended criminal cases. Based on that experience,

I am convinced . . . that there is a much greater risk [than the wholly false confession]: the interrogee who is guilty of some wrongdoing may, either through ignorance or in order to end the pressure of interrogation accede to a more serious version of the offense. The resulting confession is partially true. However, the one or two-line inaccuracy or falsity may spell the difference between an aggravated offense and a mitigated offense.¹⁶³

Thus, even assuming guilt, it is important to develop rules to control interrogation.

Second, contrary to what the Attorney General has said, not all suspects who are taken in for interrogation are guilty.¹⁶⁴ Consequently, interrogation must be controlled to protect the innocent.

The third answer has nothing to do with the reliability of confessions, but is just as important. It is also easy to forget. As Justice Frankfurter observed some years ago, "the history of liberty has largely been the history of observance of procedural safeguards,"¹⁶⁵ and "not the least significant test of the quality of a civilization is its treatment of those charged with crime."¹⁶⁶

161. See W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 212-16 (2d ed. 1986).

162. For example, in the law of homicide, premeditated killings are generally treated more harshly than purposeful, but unpremeditated, killings, *id.* at 642, and purposeful killings are treated more harshly than unintentional, but unlawful, killings. *Id.* at 668-81. In addition, defenses such as mistake, intoxication, and self-defense involve an inquiry into the actor's mental processes. *Id.* at 405-07 (mistake); *id.* at 387-92 (intoxication); *id.* at 454-58 (self-defense). The precise words with which a suspect characterizes his mental state may therefore be of crucial importance in determining whether he is guilty of any offense, and, if so, of what degree he is guilty. For a dramatic illustration, see *Record*, p. 138, *Stroble v. California*, 343 U.S. 181 (1952), in which the suspect, skillfully interrogated by an assistant prosecutor, admitted an intention to kill.

163. Herman, *supra* note 22, at 454 n.25. See also Saltzburg, *supra* note 18, at 24.

164. See, e.g., F. SHAPIRO, *WHITMORE* (1969) (recounting celebrated case of suspect whose detailed, 60-page confession to two murders was false); *Time*, Feb. 5, 1965, at 69 (same).

165. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

166. *Irvin v. Doud*, 366 U.S. 717, 729 (1961) (concurring opinion).

